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Supreme Court, U.S.
FILED

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No._____

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# IN THE SUPREME COURT OF THE UNITED STATES

February Term, 1998

WILLIAM A. KENT, aka
WILLIAM A. GOICHMAN

Petitioner,

vs.

CITY OF CARMEL.

Respondent

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITES STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM A. KENT, ESQ.
15242 Normandie Av.
Irvine, Ca. 92604
(714)(651-1102)

Petitioner In Pro Per.

41PP

## QUESTION PRESENTED

**May a Court of Appeal Refuse to Hear an Appeal as untimely by improperly ignoring the "single document" judgment rule contained in FRCP 58, WHERE the District Court never issued a "single document" judgment, but rather two rationale opinions, one 4 pages long and the other 6 pages long?**

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner, WILLIAM A. KENT, hereafter "Petitioner," respectfully prays that a writ of certiorari be issued out,of, and under the seal of, this Court to review the opinion and order of the United States Court of Appeals for the Ninth Circuit which refused to hear the appeal from the August 22, 1996, order of the District Court as untimely and which found that that the denial of a petition for reconsidera-

tion of the order of November 27, 1996, was not an abuse of discretion.

## OPINIONS BELOW

The opinion of the Court below filed November 6, 1997, and the Order dismissing Application for Rehearing, dated January 9,1998, are reproduced in full text as Appendix I and Appendix II to this Petition.

The Opinions of the United States District Court for the Northern District of California, dated August 22, 1996, and November 27, 1996, are reproduced in full text as Appendix III and IV.

The Judgment of the US District Court for the Northern District of California, dated May 14, 1979, is reproduced in full as Appendix V.

## JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 6, 1997, and the order on Petition for Rehearing was entered on January 9, 1998. This petition for certiorari is filed within ninety days of the original judgment of the Court of Appeals and the order denying Petition for Rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 58:

Rule 58. Entry of Judgment.

". .. Every judgment shall be set forth in a separate document. . . ."

## STATEMENT OF THE CASE

On May 14, 1979, US District Court, Hon. Spencer William's, issued a final Judgment in a civil rights case against

the City of Carmel, W.C. Kelly, the towing police officer, and Harry Giem, dba Giem's Service Station.

The District Court enjoined them from towing cars until they had in place a "due process" hearing procedure as required by the seminal decision in Stypmann v. City of San Francisco, 557 F.2d 1338 (9th Cir. 1977) (Hon. James Browning, wrote the Opinion).

This action had been started as a class action which the US District Court and the Ninth Circuit did not allow. In the first go-around in this 1974 case, two appeals had been made to the Ninth Circuit. The first appeal from the US District Court's judgment of September 10, 1975, and, then, upon remand, from the second judgment of May 14, 1979.

The Ninth Circuit had sent the case back after the first appeal for issuance of an injunction and ordered that the towing fee be refunded to Plaintiff. It also ordered the fixing of an attorney's fee..

Upon remand, the US District Court fixed costs, which were to be paid by the City of Carmel, and fixed the

return of the towing fee and an attorney's fee which was to be paid by the towing operator.

The District Court also entered an injunction against Carmel Police Deparmtnet until "due process" hearing procedures were adopted, as required by the Stypmann decision.

Before the final judgment was entered in the District Court, Plaintiff had brought a motion to add the "City of Carmel" to the proceedings as a party defendant under Brandon v. Holt, 415 US 651, 664, 94 S.Ct. 1347, 1356, 39 L.ed. 2d 662 (1974) and Hutto v. Finney, 437 US 678, 98 S.Ct. 2465, 57 L.ed. 2d 522 (1978). That was denied by Judge Cecil Poole on May 2, 1979. Judge Poole allowed a $100.00 attorney's fee and quashed the stay of injunction.

The Final Judgment was issued by the Court by Judge Spencer Williams on May 14, 1979.

The Final Judgment was a single document and it provided, *inter alia*, that the Carmel Police Department be enjoined from towing vehicles until it complied with the

Stypmann case. It also required the City of Carmel to pay costs.

An appeal was taken from this Final Judgment by the Plaintiff only as to the low amount of attorney's fees and the denial of the class. There was no appeal from Judge Poole's order denying the adding of the City of Carmel as a party defendant since the Final Judgment by Judge Spencer had corrected that by joining the City of Carmel. Because the City of Carmel had paid for the attorneys for the Defendants, had conducted the litigation in the names of its officers, had paid the costs order, the City did not take any appeal from the Final Judgment imposing upon it an injunction in the towing of vehicles until it passed the right ordinance.

While the first Final Judgment of the US District Court was appealed and reversed, on August 24, 1978, the second appeal from the Second Final Judgment was affirmed on March 30, 1981.

As time went on Petitioner wrote to the City of Carmel during the 80's & 90's to inquire whether they had adopted

"due process" hearing procedures in accordance with the Judgment of Injunction issued by Judge Williams on May 14, 1979.

When it finally appeared that they had not, Petitioner brought a motion for issuance of an OSC re Contempt on June 25, 1996.

Without any hearing, Judge Spencer Williams on August 22, 1996, issued an order in which he said that he added the City of Carmel as a party defendant as a "mere oversight" and denied the motion for an OSC .

On a Petition for reconsideration, Judge Spencer Williams again stated that the injunction against the City of Carmel was a "clerical error" under Rule 60(a).

At no time, did Judge Williams modify the Final Judgment of May 14, 1997, vacate that part of it relating to the City of Carmel and that Final Judgment still stands today, as it was, on the court reocrds.

Because Petitioner did not take an appeal from the August 22, 1996, Opinion and "Order" of Judge Williams,

within 30 days, the Court of Appeals refused to consider the appeal from that "order" timely made after the petition for reconsideration was denied.

During the pendency of the appeal, The Ninth Circuit by letter that the appeal was appropriate for summary disposition without a hearing with no reasons given. Petitioner then "suspected" something was afoot and asked the Court of Appeals for the right to brief the issue of the "single document" rule set forth in Rule 58. The Court of Appeals turned a deaf ear to this request and went ahead with its summary handling of the appeal.

On November 27, 1997, the Court of Appeals issued its decision denying the right of appeal from the August 22, 1996, order, out of hand.

The first time that Petitioner had any opportunity to brief the issue occurred when Petitioner filed a Petition for Rehearing under FRAP 40 in which Petitioner cited the cases of US v. Indrelunas, 411 US 216, 222, 93 S.Ct. 1562, 36 L.ed. 2d 202 (1973) and Bankers Trust Company v. Mallis,

435 US 381, 386, 98 S.Ct 1117, 1121, 55 L.ed. 2d 357 (1978)

On January 9, 1998, the Ninth Circuit denied the Petition for Rehearing, but never discussed Rule 58, "the single document' rule. It is as if this Rule did not exist, nor were the controlling cases of this Court of any moment..

The net result was that an injunction against the City of Carmel for almost 20 years was and is not enforced and the "due process" procedures which the federal ccourts had required the City of Carmel to take have not been taken some 20 years later. Sad to say, in this litigation, the tenets of the US Constitution were not "upheld."

## PETITIONER'S CONTENTIONS

Petitioner contends that the Ninth Circuit was in error in failing to apply the "separate document"rule in light of the cases cited and to find that theAugust 22, 1996, "opinion and order" of Judge Spencer Williams was not a final judgment as there was no "single document" issued for his judgment.

The Court of Appeals should have either remanded the

case to the US District Court to enter a "single document" Final Judgment as required by Rule 58, or "spun" around the case and considered that the US District Court had now done that and entertained the appeal on the "spin around" basis.

The law regards that done which ought to have been done. Under no circumstances should the Ninth Circuit have refused to hear the appeal, which is why this Petiton for a writ is being filed.

## REASONS FOR GRANTING THE WRIT

Chief Justice John Marshall alluded to the duty of upholding the Constitution as the highest duty a Judge can perform in Marbury v. Madison.

When the Final Injunction was issued on May 14, 1979, against the City of Carmel, because it did not employ "due process" procedures in its towing actions, there was ample time for the city of Carmel to appeal that decision against it.

The evidence is clear that it financed the litigation, paid the lawyers, conducted the litigation for its police officers, and paid the costs when it was named in he litigation for payment

of costs. When it was named in the litigation for the injunction on May 14, 1979, it had the perfect opportunity to appeal its being named. But it did not do so.

The reasons it was not named originally are identical to the reasons in Brandon v. Holt, *supra*, that the City of Memphis was not named, viz., a city could not be sued in its own name under Monroe, but could later under Monnel.

The City of Carmel defied the Order of the US District Court, continued towing without complying with "due process" procedures and only when **this** litigation surfaced did the City of Carmel present a resolution saying that it was now trying to comply.

The Us District Court completely overlooks Brandon v. Holt and when it was called to its attention at argument on the petition for reconsideration, the district court judge attempted to distinguish Brandon v. Holt as a damages case not an injunction case, overlooking the various opinions in Brandon v. Holt which accepted the injunction situation as a "given.." This is apart from the obvious arguments of estoppel,

waiver, consent, voluntary appearance, etc.

In other words, Judge Spencer Williams misapplied and misinterpreted the Brandon v. Holt case.

When the appeal was filed from the two opinions, one issued on August 22, 1996, and one issued on November 27, 1996, the Court of Appeals itself overlooked FRCP 58 and the decisions of this Court interpreting it and held that the appeal as to the August 22, 1996, order, was untimely, completely ignoring the "single document" rule, as well the cases.

What is even more distressing is that the Court of Appeals did not even set forth the facts pertaining to the "single document" rule nor discuss the reasons why it does not apply to save the appeal from the "jaws" of oblivion.

The Ninth Circuit decided a federal question "In a way that conflicts with applicable decisions of this Court." Rule 10 Sup. Ct. Rules. The Ninth Circuit "has so far departed from the accepted and usual course of judicial proceedings," 'and "sanctioned such a departure by a lower court," "as to call for an exercise of this Court's power of supervision."

Rule 10.

The original complaint had been filed in 1974 An injunction was issued on September 10, 1975, and stayed. After an appeal to the Ninth Circuit, the case was remanded

After hearings, a Final Judgment was issued on May 14, 1979. A appeal was again taken but this time affirmed. No one ever raised the issue of why the City of Carmel had been enjoined in 1979, nor even whether the City of Carmel should have been a party. Why did not theCity of Carmel back in 1979 raise that issue by reconsideration or appeal?

The City of Carmel ignored the injunction for many years (17 to be exact), then when a motion was made for an OSC re contempt, the City of Carmel disingenuously for the first time made the astounding claim that it was never a "party" to the litigation. Judge Williams, some 17 years after the fact, agreed. He said he had made an "oversight" and denied the motion for an OSC.

On reconsideration, he issued another opinion standing by his guns. On appeal, the Ninth Circuit, not concerned with

the amorphous way the lower court had been deciding the motion for an OSC nor concerned about the long-standing injunction directed to Carmel to obey the US Constitution, appears to have looked for some way out of deciding the importunate appeal

It ruled that the appeal from the August 22, 1996, order, was untimely. Not once did it discuss the timing of the appeal vis-a-vis the 4-page opinion or the 6-page opinion and the effect of the failure of the lower court to issue a "single document" as it did way back on May 14, 1979 and as required by FRCP 58.

No one can tell from its opinion that its decision is incorrect. On rehearing, the Ninth circuit again refrained from discussing Rule 58 or the facts which would make it applicable.

This kind of mystification involving court injunctions and court orders and the United States Constitution require this Court to exercise its supervisory capacity so as to set the matter aright, lest the extraordinary departures from the rules

continue to constituite a blemish upon the escutcheon of justice.

What is the status of the injunction issued back in May 14, 1979? It would appear that it has ben consigned to limbo or some other God-Forsaken place and the city of Carmel, which has blatantly defied the injunction for all these many years still appears to be without the proper procedures. A Justice system which delivers so little or nothing of its judgments at the end of the line for so mamy years can hardly live up to the responsibilities which are confided to it.

Moreover, the Ninth Circuit is in effect sanctioning a departure from the established law by the lower court. The usual and accepted rules when refusing to enforce an injunction would be to take the injunction off the books rather than keeping it on the books if the injunction were not valid, an issue the Ninth Circuit did not seem wont to decide.

The claim of a "mere oversight." some 17 years later cannot withstand the light of day.

Something is amiss and it is not in the state of Den-

mark!

The Ninth Circuit Court of Appeals' refusal to hear the appeal from the August 22, 1996, order conflicts with this Court's decision in U.S. v. Indrelunas , *supra*, at p. 23, where the Court said:

"The reason for the 'separate document' provision is clear from the notes of the advisory committee. . .. Prior to 1963, there was considerable uncertainty over when actions of the District Court would constitute an entry of judgment, and occasional grief to litigants as a result of the uncertainty [citations omitted.] To eliminate these uncertainties, which spawned protracted litigation over a technical procedural matter, Rule 58 was amended to require that a judgment to be effective only when set forth in a separate document." * * *

" That provision [Rule 58]" is, as Professor Moore states, a 'mechanical change' that must be mechanically applied in order to avoid new uncertainties as to the date on which a judgment is entered." (See, also, Wright-Miller-Kane (2ed) West Pub. Co., 1995, Rule 58, § 2785.)

In Bankers Trust Company v. Mallis, 435 U.S. 381, 386, 98 S.Ct. 1117, 1121, 55 L.ed. 2d 357 (1978), it was stated:

"The reason for the rule was 'to simplify and make certain the matter of appealability. It is not designed as a trap for the inexperienced. . .. **the rule should be interpreted to prevent the loss of the right of appeal, not to facilitate its loss**."Emphasis added.)

In 6A J. Moore, Federal Practice, 58.04e[4.-2] p. 58-161 (1972), Professor Moore states:

"it was a 'mechanical' change that would be subject to criticism for its formalism were it not for the fact that something like this was needed to make certain when a judgment becomes effective." See, also, 6A J. Moore, J. Lucas & CG Grotherer, Moore's Federal Practice ¶ 58.02.1, p. 58-22 (2ed 1986).

Doubts should be resolved in favor of the right to appeal Chicago Housing Tenants' Org., Inc. v. Chicago Housing Authority , 512 F.2d 19 (5th Cir. 1975).

The Ninth Circuit did not attempt to judge the appropriateness of the appeal from the standpoint of the "single document" rule, but, instead, regarded the four-page opinion analyzing the case by Judge Spencer as equivalent to the "single document," thus making useless and supererioga-tory the requirement of the "single document " rule in Rule 58.

The Court of Appeals did not consider the timeliness of the appeal in light of the decisions of this Court in Indre-lunas and Bankers' Trust Company, although these decisions

have not been overruled, modified nor distinghished. The Court of Appeal did not consider the "spirit" in which Rule 58 is to be interpeted and applied so that appeals are "saved," not killed. If it had, there would have been a different result.

## CONCLUSION

**If the Ninth Circuit Court of Appeals had interpreted the appropriateness of the appeal in light of the decisions of this Court in Indrelunas and Bankers' Trust Company, supra, it is clear that the appeal would not have been dismissed.**

**Unless this Honorable Court assumes jurisdiction in this case and reverses the decision of the Court of Appeals in light of the prior decisions of this Honorable Court, a terrible miscarriage of justice will have been done and "the departures" from the usual and accepted course of judicial proceedings will have won out.**

Respectfully submitted,

William A. Kent

WILLIAM A. . KENT
Petitioner

# APPENDIX I

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
Nov-6-1997
CATHY A. CATTERSON,
Clerk, US Court of
Appeals

WILLIAM A. KENT, aka WILLIAM A GOICHMAN, on behalf of himself and a class of all persons similarly situated,
Plaintiff-Appellant,
v.
W.C. KELLY, THOMAS FRAZIER, Office; DAVID MARSHALL; HARRY GIEM SERVICE STATION,
Defendants-Appellees,

No. 96-17295.
D.C.No. CV-74-01229-SW

MEMORANDUM*

Appeal from the United States District Court for the Northern District of California, Spencer W. Williams, Senior District Judge, Presiding
Submitted November 4, 1997**
Before: HUG, Chief Judge, PREGERSON, and BEEZER, Circuit Judges.

William Kent ("Kent") appeals pro se the district court's August 22, 1998 order denying his motion for an order to show cause why the City of Carmel and the Carmel Police Department ("collectively "Carmel") should not be held in contempt pursuant to a 1979 injunction. Kent also appeals the district court's

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

November 27, 1996 order denying his motion for reconsideration or rehearing of the August 22, 1996 order. Because the appeal as to the August 22, 22, 1996 order is untimely, we are limited to reviewing the district court's November 27, 1996. We have jurisdiction under 28 U.S.C. § 1291 to review the November 27, 1996 order, and we affirm.

I

Kent desires review of both the denial of reconsideration and the earlier August 22, 1996 order denying his petition for an order to show cause why Carmel should not be held in contempt. Under Rule 4(a)(1) of the Federal Rules of Appellate Procedure, a notice of appeal must be filed within thirty days after the date of the order appealed from. Fed. R.App. P 4(a)(1). Here, the order appealed from was entered on August 22, 1996. Kent filed his notice of appeal on December 6, 1996, more than three months later. Therefore, the August 22, 1996 order cannot be disturbed unless the thirty-day deadline was tolled.

Kent contends that the thirty-day deadline was tolled when he filed the motion for reconsideration. He argues that his

motion for reconsideration may be construed as a motion to alter or amend the district court's order under Federal Rules of Civil Procedure 60(b), 59(e), or 52(b). Properly filed, these motions to toll the thirty-day period. United States v.Nutri-Cology, Inc., 982 F.2d 395, 396-397 (9th Cir. l992).

A Rule 60(b) motion to alter or amend a judgment may be made within a year of judgment. However, it tolls the time for filing a notice of appeal only if it is filed "no later than 10 days after the entry of judgment." Fed.R. App. P. 4(a)(4J)(F). For the purpose of Rule 60(b), the computation of ten days includes weekends and holidays. Fed. R. App. Motions for reconsideration can also be construed as motions to alter or amend a judgment under 59(e) if filed no later than ten days after entry of the judgment. Fed. R. Civ. P. 59(e). Nutri-Cology, 982 F.2d at 397. timely Rule 59(e) motions are tolling motions for purposes of filing a notice of appeal. Taylor v. Knapp, 871 F.2d 803, 805 (9th Cir. l988). However, Kent's motion was not timely under Rule 59(e). Unlike Rule 60(b) motions, the computation of the ten day period excludes weekends and holidays. Fed. R. Civ. P.

6(a) However, even excluding weekends and holidays' Kent's motion was filed eleven days after the order was entered, one day too late. Therefore, the tolling provision does not come into effect.

Finally, a motion to amend or make additional findings of fact under Federal Rule of Civil Procedure 52(b) also tolls the deadline for filing a notice of appeal. Nutri-Colgy, 982 F.2d at 397. As with Rule 59(e) motions, the ten-day period is computed excluding weekends and holidays. Again, Kent's motion was filed one day too late and therefore was not timely. Fed. R. Civ.P. 6(a).

Because Kent's motion for rehearing did not toll the thirty-day notice requirement of Rule 4(a)(1), his appeal as to the August 22, 1996 order was not timely Therefore, we lack jurisdiction to review it.

II

Kent's notice of appeal is timely with respect to the district court's denial of his motion for reconsideration. The district court's order denying reconsideration was entered on November 227, 1996 and Kent filed his appeal on December 6,

1996, well within the thirty-day limit. We review the district court's denial of a motion for reconsideration for abuse of discretion. Nutri-Cology, 982 F.2d at 397.

The district court did not abuse its discretion in denying the motion for reconsideration. Kent's motion for reconsideration cannot be treated as either a rule 59(e) or a 52(b) motion because it

was not filed within ten days of the August 22, 1996 order. Fed R. Civ. P. 59(e) & 52(b). Therefore, the only possible grounds for reconsideration was a Rule 690(b) motion. This motion was properly denied if brought pursuant to Rule 60(b), which provides for reconsideration only upon a showing of (l) mistake, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, (4) a void judgment;(5) a satisfied or discharged judgment; or (6) "extraordinary circumstances" that would justify relief. Fed.R.Civ.P. 60(b). Kent does not argue that his case falls within any of these exceptions, nor could he do so successfully. Therefore, the trial court properly denied Kent's motion for reconsideration of the August 22, 1996 order, and we AFFIRM.